IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952

No. 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONER.

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I.

The state court did not construe the ordinance as exempting vehicles used both in local and interstate commerce where the two types of commerce are not inseparable; so that its decision that the ordinance was inapplicable to respondent's business rests entirely upon the court's conclusion that the commerce clause bars a local tax upon purely local business when it is inseparably intertwined with the same taxpayer's interstate operations. This is clearly a Federal question.

Respondent's claim that the state court did not decide a Federal question is founded upon the erroneous premise that the ordinance was construed as limited to vehicles engaged exclusively in intracity transportation, *i. e.*, that vehicles used both in local and interstate commerce (although separable) are not within the intended reach of the ordinance at all. It is clear both from the principal opinion (R. 22-19) and from the clarifying opinion (R. 39-40) that the ordinance was construed as not exempting from the local tax vehicles used in both kinds of commerce, if separable. The opinion of the Supreme Court of Illinois expressly states (R. 25):

> "As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business."

The opinion then referred to this Court's decision in *Osborne* v. *Florida*, 164 U. S. 650, where the state court had construed a state statute imposing a license tax on business done "within the city" (just as in the ordinance at bar) as confined to local, and as excluding interstate, business (R. 25). The opinion then appraises the decision in *Osborne* v. *Florida*, 164 U. S. 650, as follows (R. 25):

> "The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character."

It was the inseparability between the two types of commerce which impelled the court to hold that even the local commerce assumed an interstate character and hence was

not subject to the local tax. Thus the opinion states (R. 25):

> "The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged in interstate commerce within the meaning of that term and is not subject to the license tax here in question."

The subsequent clarification of the opinion, pursuant to the mandate of this Court, confirms beyond all doubt (1) that the Supreme Court of Illinois did not construe the ordinance as exempting vehicles from the tax merely because they were engaged both in local and interstate commerce, whether separable or not, and (2) that the decision that the ordinance was inapplicable to respondent's business rests entirely upon the court's conclusion that the commerce clause precludes the imposition of the local tax even upon respondent's purely local business because of the inseparability between respondent's local and interstate operations (R. 39-40). This, we respectfully submit, is clearly a Federal question which this Court has the ultimate power to decide.

The interpretation which respondent is seeking to place upon the state court's decision would, if adopted, impute to the Illinois Supreme Court an intent to interpose, arbitrarily, an unfounded and unsupportable non-Federal ground of decision as a mere device to prevent the review by this Court of the Federal question upon which the state court's judgment necessarily rests. Such an imputation is unwarranted, nor will this Court permit such an evasion of its review jurisdiction in any event. (*McCoy* v. *Shaw*, 277 U. S. 302, 303; 72 L. ed. 891, 892; *Ancient Egyptian Arabic Order, etc.* v. *Michaux*, 279 U. S.

737, 745; 73 L. ed. 931, 936.) And this Court has held that it will determine for itself whether the state court judgment is based on a matter of purely local concern or necessarily rests upon the decision of a Federal question. (*Vandalia Railroad Co.* v. *State of Indiana ex rel. City of South Bend*, 207 U. S. 359, 367; 52 L. ed. 246, 248; *Angel* v. *Bullington*, 330 U. S. 183, 189; 91 L. ed. 832, 836.)

II.

The decision of the Illinois Supreme Court is in conflict with the decisions of this Court on the Federal question forming the basis of the state court judgment.

Respondent contends that its business is largely interstate commerce, and suggests (Br., p. 11) that a shipment of freight within the city is within the scope of the ordinance although it be but a segment of an interstate journey. This is an erroneous representation of the construction placed upon the ordinance by the Illinois Supreme Court which held that it taxed only intracity commerce, *i. e.*, shipments which commenced and ended within the city limits (R. 24-25). The ordinance in express terms taxes vehicles engaged in transportation "within the city" (R. 5), and the Illinois Supreme Court construed said quoted phrase to mean shipments whose point of origin and point of destination were both within the city limits. In so construing the phrase "within the city", the state court adopted and followed the language of this Court in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, where it was stated: "'Business done within this State' cannot be made to mean business done between that State and other States" (R. 24-25). Indeed, had the state court construed shipments "within the city" to include initial, intermediate or terminal within-

the-city segments of interstate commerce, it would not have upheld the validity of the ordinance. What the Illinois Supreme Court really did was to construe the ordinance as confined to purely local commerce and therefore valid, but to hold that the commerce clause barred its application to respondent's business because it consisted also of interstate commerce which was inseparably intertwined with respondent's purely local business.

What respondent is really attempting to do is to make it appear that its intracity business, which is the only thing the ordinance seeks to tax, is not purely local business but really a part or segment of interstate commerce. This is contrary to the record which expressly stipulates that each of respondent's vehicles, during every single day of the year, carries not only property destined to points outside the city and outside the State, but also "property which never leaves the city" (R. 9).

Respondent relies upon *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 56 L. ed. 237 (Resp. Br., p. 10), which held that a crew operating a train carrying interstate and intrastate freight at the same time was subject to Federal regulation as to hours of service, notwithstanding that part of its load consisted of intrastate commerce. There is nothing in that decision involving the power of a State or municipality to tax the local business of a person who is also engaged in interstate commerce at the same time. The inapplicability of that decision to the case at bar stems also from the fundamental distinction between *regulation* and *taxation* in determining the propriety of the simultaneous co-exercise of Federal and State power. The paramount Federal power to *regulate* an instrumentality engaged both in interstate and local commerce at the same time may well preclude the enforcement of a

conflicting local regulatory provision limited to the local business, where the attempted enforcement of both regulations would bring them into collision. *Taxation*, however, possesses a greater conformability and flexibility, permitting the co-exercise of Federal and State power, each in its proper sphere, without the encroachment of the one upon the other, notwithstanding the inseparable commingling of Federal and State subject-matter. The ordinance here is purely a revenue measure aimed only at the local operations of the respondent. It does not seek to tax any vehicle in respect of its use in interstate commerce. If the local tax upon the local business is reasonable in amount, and is not a disguised attempt to impose a charge for the doing of interstate business, then the local taxing power operates within its proper sphere no matter how closely intertwined the interstate and local operations of the taxpayer may be. We believe that this is a fairly accurate paraphrase of what this Court has said upon this subject.

The case of *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. ed. 883 (Resp. Br., pp. 13-14), has already been distinguished in our certiorari petition (p. 19). This Court pointed out in that case that the Supreme Court of Indiana construed the ordinance there involved as applying not only to busses engaged in intrastate commerce, and to busses engaged both in intrastate and interstate commerce, *but also to busses operated exclusively in interstate commerce;* and it is for that reason that this Court held the local occupation tax void under the commerce clause (277 U. S. 163, at p. 171).

The case of *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934 (Resp. Br., pp. 14-16), has likewise been distinguished in our certiorari

petition (p. 20) on the ground that, there, the local taxing statute was held invalid because applying indiscriminately both to local as well as to exclusively interstate business. The tax in that case was imposed upon each telephone instrument used in furnishing telephone service in the State of Montana, and this Court pointed out that it did not appear that the statute had been construed by the state court (294 U. S. 384, at p. 398). This Court there also pointed out the distinction between the two cases of *State* v. *Rocky Mountain Bell Telephone Co.*, 27 Mont. 394, 71 Pac. 311, where the state court construed the statute to apply only to telephone instruments used in purely intrastate business and held it to be valid, and *State* v. *Northern Pacific Express Co.*, 27 Mont. 419, 71 Pac. 404, where the state court held the occupation tax void because it applied indiscriminately to interstate as well as to local transportation (294 U. S. 384, at pp. 388-389). This Court held the tax in the *Cooney* case invalid for the following explicit reasons (294 U. S. 384, at pp. 390-391):

> "No distinction is made between interstate and intrastate service.
>
> * * * * *
>
> "Again, there is no limitation as to use, control or operation in intrastate business.
>
> * * * * *
>
> "The tax is thus laid simply by reason of the fact that the company is furnishing telephone service and is based upon the number of telephone instruments used in that service without regard to its character whether intrastate or interstate.
>
> * * * * *
>
> "All the telephone instruments, not excepted, whether they are used in intrastate or interstate commerce and however the service is paid for, are left subject to the tax."

The ordinance in the case at bar is not subject to this objection because, by its terms and as construed by the Supreme Court of Illinois, it taxes the vehicles only in so far as they are used in intracity business and does not attempt to tax vehicles used exclusively in interstate commerce.

Respondent's Brief (p. 16) attempts to distinguish the case of *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, on the ground that there the tax was levied solely upon the gross income from intrastate commerce. This may be a distinction of form, but not of substance. Here, also, the tax is levied upon vehicles solely in respect of their use in local commerce; no part of the tax is referable to any interstate business in which the same vehicle may be used; and any vehicles used exclusively in interstate commerce would not be subject to the tax at all.

III

The ordinance does not cast an undue burden upon interstate commerce, since it imposes the tax only upon vehicles engaged in local commerce, and the fact that such vehicles are also used in interstate commerce, and that both types of commerce are inseparably linked, does not ipso facto establish a case of undue burden.

Respondent contends (Br., pp. 18-19) that the tax levied by the ordinance is a direct burden upon interstate commerce because it taxes vehicles that are used both in intrastate and interstate transportation which are inseparably intertwined. This ignores the proposition that the ordinance does not purport to tax motor vehicles because they are used in interstate commerce, but only because they are

engaged in local commerce. The fact that the same vehicle which is engaged in local commerce, and taxed for that reason, is also engaged in interstate commerce, does not convert the tax levied by reason of the vehicle's use in local commerce into a tax upon interstate commerce to any extent at all. This is altogether different from the situation involved in *Cooney* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384, 79 L. ed. 934 (Resp. Br., p. 18), where the tax was levied indiscriminately upon all telephone instruments within the State, irrespective of whether they were used only in local commerce, or both in local and interstate commerce, or exclusively in interstate commerce.

It is respectfully submitted that a local tax upon a vehicle admittedly used in local commerce does not become a tax upon an instrumentality of interstate commerce, notwithstanding that the same vehicle is also engaged in interstate commerce, and that both types of use are inseparable. Consequently, the respondent's contention that the tax here involved is "necessarily" a tax upon an instrumentality of interstate commerce and needs no evidence to establish the existence of an undue burden upon interstate commerce, or that undue burden is presumed from the fact of inseparability between both types of commerce, is entirely without merit.

IV.

The Federal question here presented is of great public importance both from a qualitative and quantitative standpoint.

Respondent's contention that this case presents no important question of Federal law is premised upon its erroneous contention (already adequately refuted) that no Federal question is involved at all. Contrary to the assertion in Respondent's Brief (p. 19), the Illinois Supreme Court did more than merely construe the ordinance as valid because intending to apply only to vehicles in respect of their local operations. It went further and held the ordinance inoperative as against the respondent by reason of the erroneous conclusion reached that the commerce clause of the Federal Constitution prevents the imposition of a local tax upon vehicles engaged in local commerce, merely because such vehicles also engage in interstate commerce, and an inseparability exists between the two types of commerce. This was a decision of a Federal question.

Respondent asserts finally (Br., p. 19) that the question presented involves only the operations of this particular respondent. This contention ignores the record which shows that there are "upward of 3,000 individuals, firms or corporations", engaged in the transportation of freight by motor vehicle within the City of Chicago, "who are similarly situated with the Defendants" (meaning the respondent) "as to matters and things complained of herein" (R. 10).

Moreover, the City of Chicago, the petitioner herein, as well as every state and municipality in the entire nation,

will be affected by the decision because the question of their power to tax purely local occupations is directly involved. The consequence of the erroneous decision of the Supreme Court of Illinois, if it were to receive the implicit sanction of this Court by not being disapproved, is to strip the several states and their municipal subdivisions of the power to levy occupational taxes upon purely local business in every case where it integrates itself with interstate commerce so as to become inseparably intertwined therewith, despite a total absence of proof that an undue burden upon interstate commerce actually results. This decision, if permitted to stand, will provide a ready avenue for the escape of purely local business from local taxation, and would destroy the well established line of demarcation between Federal and State power in the field of taxation.

It is respectfully submitted, therefore, that the case presents a substantial Federal question of sufficient public importance to require its resolution by this Court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be allowed, and that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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